

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STEVEN L. CLARK)	
Claimant)	
VS.)	
)	Docket No. 1,023,075
FISHERS AUTO SERVICE, INC.)	
Respondent)	
AND)	
)	
WESTPORT INSURANCE CORP.)	
Insurance Carrier)	

ORDER

Respondent appeals the June 28, 2005 preliminary hearing Order of Administrative Law Judge John D. Clark. Claimant was awarded benefits after the Administrative Law Judge (ALJ) determined that claimant had suffered accidental injury arising out of and in the course of his employment with respondent on April 1, 2005. Michael H. Munhall, M.D., was ordered as the authorized treating physician, with past medical expenses ordered paid.

Respondent contends that claimant did not suffer the accidental injury in the manner described, but instead suffered a later injury with the employer claimant worked for after leaving respondent's employment. Respondent further denies that claimant's description of the incident is accurate, arguing instead that the work-related accident was merely an incident which resulted in no injury to claimant's shoulder.

ISSUES

1. Did claimant suffer accidental injury on the date alleged?
2. Did claimant's accidental injury arise out of and in the course of his employment?

3. Did claimant suffer a later accident with a subsequent employer, which is the reason for claimant's need for medical treatment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant was a mechanic working for respondent on April 1, 2005, which was his last day worked. Claimant was in the office of respondent-owner when Daniel Blouch, claimant's supervisor, came in. At some time during the day, Mr. Blouch took hold of claimant's right arm in the wrist area with both of his hands. He shook claimant's arm, telling claimant he did not want him to leave because he was a good mechanic. At that point in time, the description by the various witnesses varies considerably. Claimant testified that the arm shake was significant enough to cause him shoulder pain. Mr. Blouch and a witness, Marcia Enriquez, testified that the arm shake, which they say occurred before lunch, was minor and that claimant displayed no outward signs of pain. Mr. Blouch also testified that claimant then proceeded to load his tools into his father-in-law's vehicle, again with no apparent indication of pain. In this instance, all three witnesses remember the incident in question. However, claimant disputes that the incident occurred in the morning, saying that it instead occurred between 4:00 and 4:30 in the afternoon, after he had already loaded all of his tools into his truck. Claimant testified that at that time Mr. Blouch took his arm and shook his hand, causing the shoulder injury.

Claimant testified that after he left respondent's employment that day, he went home and later that afternoon, called Mr. Blouch on Mr. Blouch's cell phone to tell him that he had suffered a shoulder injury and that Mr. Blouch needed to be more gentle with older employees. Mr. Blouch denied remembering those telephone calls, but claimant provided copies of his cell phone telephone bill, which did show two calls to Mr. Blouch's cell phone on April 1, 2005, one lasting for one minute and one lasting for two minutes. Claimant testified the first call had to be redone because Mr. Blouch's cell phone was busy the first time, so he called him the second time. Respondent argues that a two-minute phone call is not sufficient to complete the discussion claimant described.

Claimant left respondent's employment and went to work doing the same type of work as a mechanic for a competitor. While working for his new employer, claimant was connecting a connector under a dashboard. This required that claimant lie on his back and reach up underneath the dashboard, squeezing the connector. It was while doing this that claimant determined he had a problem with his shoulder and that the shoulder problem needed to be checked out. Up to this point, claimant had not requested medical treatment for his shoulder. He testified that the shoulder had continued to bother him from the time of the accident, but he had originally anticipated that it would get better, which it did not. On May 5, 2005, claimant finally decided that he needed to seek medical treatment for the shoulder. This date conflicts somewhat with respondent representatives, as Mr. Blouch

testified that he first found out claimant was claiming workers compensation on April 28, 2005, when claimant called him on his cell phone. Mr. Blouch testified that claimant contacted him on April 18, 2005, telling him that his shoulder was “bugging him,” but claimant did not at that time make a specific reference to a work-related injury.

In workers compensation litigation, it is the claimant’s burden to prove his entitlement to benefits by a preponderance of the credible evidence.¹ The ALJ had the opportunity to observe claimant testifying in person. This allows the ALJ the ability to observe the credibility of claimant’s testimony, which is, at times, an advantage. The Board will sometimes give some credence to administrative law judges’ decisions due to this ability to assess a witness’s credibility during live testimony.

It is clear from this record that the incident with Mr. Blouch grabbing claimant’s arm did occur, although it is uncertain whether it occurred in the morning or the afternoon, or whether there were two separate incidents. Obviously, claimant’s arm was shaken, although the extent of the shake is disputed. Also, the telephone records support claimant’s contention that claimant did contact Mr. Blouch’s cell phone on two occasions on the afternoon of April 1, 2005, the date of the alleged injury.

The Board finds, although this is a confusing record, that claimant has proven that he did suffer accidental injury arising out of and in the course of his employment with respondent on the date alleged. The Board cannot find that the incident at claimant’s new employer as described by claimant was sufficient to have caused an intervening injury, which would allow respondent to avoid the responsibility of this accident. The Board, therefore, finds that the preliminary hearing Order of Administrative Law Judge John D. Clark should be affirmed.

Preliminary hearing findings are not binding on the claim in a full hearing, but shall be subject to a full presentation of the facts.²

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated June 28, 2005, should be, and is hereby, affirmed.

IT IS SO ORDERED.

¹ K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

² K.S.A. 44-534a.

Dated this ____ day of October, 2005.

BOARD MEMBER

c: Gary A. Winfrey, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director